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No. 85-1403

In the Supreme Court of the United States

OCTOBER TERM, 1985

KANSAS GAS AND ELECTRIC COMPANY,
Petitioner
vs.
WILLIAM E. BROCK,
Secretary of Labor,
Respondent
and
JAMES E. WELLS, JR.,
Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

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EDITOR'S NOTE

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QUESTION PRESENTED

Whether Section 210(a) of the Energy Reorganization Act, 42 U.S.C. Sec. 5851(a), prohibits discrimination against and discharge of a "quality assurance" inspector for reporting nuclear safety concerns to his employer.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Respondent James E. Wells, Jr., respectfully requests that the Court deny the Petition of Kansas Gas and Electric Company that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on December 26, 1985.

STATEMENT OF CASE

The respondent concurs to some degree with the statement of case propounded by petitioner in its brief. Respondent submits the following in supplementation of those facts submitted by petitioner.

The Administrative Law Judge from the Department of Labor in determining that Wells had engaged in protective activity looked no further than his analysis of whether internal reports would qualify as protected activity under 42 U.S.C. Sec. 5851(a). The Law Judge in a very detailed analysis concluded that, in fact, internal reports would be protected activity and, thus, it was unnecessary to determine whether there were contacts with the Nuclear Regulatory Commission (NRC). The Law Judge did note that one report Wells filed concerned the anchor bolt program at the Wolf Creek Generating Station which was not corrected despite a previous NRC investigation and fine and that, in fact, the QA walk-down group in which Wells was involved was itself established due to that

inspection and fine. Furthermore, the Law Judge found KG&E's testimony was shifting and unreliable and the alleged business reasons justifying its actions were inventions and pretextural. The Law Judge further found that the failure of KG&E to rehire Wells was tantamount to blacklisting. The Secretary adopted the recommended decision of Judge Warshaw with minor modifications and additions. On the issue of whether or not Wells engaged in protected activity, the Secretary looked no further than to find that Wells had internally submitted safety and quality related reports, as that was in accord with his previous holdings and in particular with the holding in Mackowiak v. University Nuclear Systems, Inc., 735 F.2d 1159 (9th Cir. 1984). In fact, during his employment, Wells intentionally requested that his quality/safety related reports be placed in interoffice correspondence since as such it became part of the permanent plant documentation for NRC review and, in fact, was in contact with NRC officials prior to his termination

concerning the discrepancies he had reported.

REASONS FOR DENYING THE WRIT

I. THE NARROW HOLDING OF THE FIFTH CIRCUIT IN BROWN & ROOT V. DONOVAN, 747 F.2D 1029 (5TH CIR. 1984) IS INSUFFICIENT IN LIGHT OF THE CLEAR STATUTORY PROVISIONS AND THE FACTS AND HOLDING IN THE INSTANT CASE TO JUSTIFY THE GRANTING OF THE WRIT.

Initially, respondent would acknowledge the Tenth Circuit indicated that they had reached a different result than that reached in the case of Brown & Root v. Donovan, 747 F.2d 1029 (5th Cir. 1984) (Brown & Root). The Court stated their rationale as follows:

> "In our view, the construction of the ERA therein employed is incorrect because it takes no notice of the agency regulations, tries to liken the term 'action' as synonymous with 'proceeding,' contends that such employment determinations are outside the competence of the Secretary of Labor because matters concerning nuclear safety are exclusively involved, and discovers

> nothing in the legislative history to support a broad construction of Section 5851."

The Tenth Circuit reached this conclusion based on a very well reasoned rationale. The Court further noted support for its position in the holdings of Mackowiak v. University Nuclear Systems, Inc., 735 F.2d 1159 (9th Cir. 1984) (Mackowiak); Consolidated Edison Company of New York, Inc. v. Donovan, 673 F.2d 61 (2nd Cir. 1982); and Wheeler v. Caterpillar Tractor Co., (Ill. Sup. Ct. No. 60181, 54 USLW 2237-38, Nov. 5, 1985).

Both the instant action and Mackowiak are examples of very reasoned and persuasive authorities consistent with the interpretation of the act by the Secretary of Labor and the NRC, while Brown & Root is a narrow and strained interpretation of the act that should not be extended to this case.

The statute at issue herein, 42 U.S.C. Sec. 5851, is part of the Energy Reorganization Act (ERA). The act deals with functions of the NRC and bestows jurisdiction in employment discrimination

matters on the Secretary of Labor. In construing the statutory language, the Court focused on both the legislative history and the broad remedial purpose of the act. The Court noted that Sec. 5851 was patterned after similar employee protection provisions in other acts including the National Labor Management Act and the Federal Mining Safety Act. The Court stated in this regard:

> "The Senate report on the ERA amendment comments that, '[t]his amendment is substantially identical to provisions in the Clean Air Act and the Federal Water Pollution Control Act. The legislative history of those acts indicated that such provisions were patterned after the National Labor Management Act and similar provisions in public law 91-173 (FMSA) relating to the health and safety of the nations coal miners.' S. Rep. No. 848, 95th Cong., 2nd Sess. at 29, 1978 U.S.C. Cong. & Ad News at 7303."

The Court noted that the cases construing these employee protection provisions stand for the general proposition that internal actions do come within the purview of employee protection as guaranteed by the respective acts. NLRB v. Schrivner, 405 U.S. 117 (1972); NLRB v.

Retail Employees' Union Common Local 876, 570 F.2d 586 (6th Cir.), cert. denied, 439 U.S. 819 (1978); Phillips v. Interior Board of Mine Operations Appeals, 500 F.2d 772, 779 (C.A.D.C. 1974), cert. denied, 420 U.S. 938 (1975). In construing the ERA, the Court further found a broad remedial purpose for protecting workers throughout the act and found support for this in the legislative history. The Court noted that a narrow, hyper-technical reading of 5851 would do little to effect the statute's aim of protection. In drafting their opinion, the Court did note that the Secretary's interpretation, as well as the rules and regulations of the NRC, were entitled to great weight and deference. Emery Mining Corp. v. Secretary of Labor, 744 F.2d 1411, 1415 (10th Cir. 1984); Donovan v. Hahner, Foreman, & Harness, Inc., 736 F.2d 1421 (10th Cir. 1984).

Brown & Root on the other hand was a narrow, hyper-technical reading of Sec. 5851 based predominately on the facts of that case which were substantially different from the instant action. The

Court in Brown & Root rejected any argument to give a broad remedial reading to Sec. 5851. On the other hand, Chief Judge Morton in DeFord v. Secretary of Labor, 700 F.2d 281 (6th Cir. 1983) pointed out that the ERA antidiscriminatory provisions must be construed so as to prevent channels of NRC information from being dried up by employer intimidation. The Court in Brown & Root mistakenly rejects this argument on the grounds that the NRC benefits only indirectly by internal reports. However, there is a very close relationship between the filing of internal reports and particularly the job of a quality assurance inspector and the NRC. Administrative Law Judge Warshaw noted:

> "The authorship of a report concerning unsafe conditions may therefore be deemed as the first step in commencing or causing to be commenced a proceeding under Sec. 5851."

He further noted that regulations at 10 CFR Part 50, App. B require quality assurance criteria be set up for all nuclear plants and that stringent guidelines be established to adequately

protect against the potential dangers of nuclear radiation, and that, in fact, Wells' walkdown group was formed because of a NRC audit of KG&E's quality assurance practices and the fine assessed against it for allowing discrepancies to exist. Judge Warshaw noted the quality assurance practices of a licensee, such as KG&E, are subject to regular audit by the NRC and the safety and discrepancy reports filed by Wells in this case may constitute the basis for a NRC compliance proceeding. The Tenth Circuit noted the same interplay between quality assurance personnel such as Wells and the NRC. The Court stated:

> "A properly functioning licensee quality assurance program is an integral part of the NRC's regulatory program. 'Quality control inspectors play a crucial role in the NRC's regulatory scheme. The NRC regulations require licensees and their contractors and subcontractors to give inspectors the authority and organizational freedom required to fulfill their role of independent observers of the construction process.' Mackowiak v. University Nuclear Systems, 735 F.2d 1159, 1163 (9th Cir. 1984). In effect, such a program serves as the eyes and ears of the NRC because the

> inspectors are always on site and take over much of the inspection burden from federal personnel. In the Matter of Consumers Power Co., 7 AEC 7, 11 (1974). The observations and judgments of quality assurance personnel on potential construction deficiencies are documented and that documentation is preserved and facilitates NRC audits. The inspection team of which Wells was a part was established to comply with these regulations. The team was also established in response to a previous NRC investigation in which KG&E was cited for a violation and fined. (Tr. 366, 572-73.)"

The Court in Brown & Root refused to consider this interrelationship.

Finally, it should further be asserted that the narrow holding of Brown & Root it is not necessarily inconsistent with the decisions in the instant case. The Court in Brown & Root remanded the case for further consideration based upon its decision that purely routine internal QC reports were not protected. In this regard, the Court held that the term "any action" under the statute required some formality but it refused to rule on what degree of formality was required. In that case the Administrative Law Judge

had found that the complainant had lied on his application, falsified documents, and was a totally unreliable witness; yet found a violation for the good faith filing of reports. Due to the falsification of records, the Secretary refused to order reinstatement. In the instant situation, we have a case where the reports filed by Wells were far from routine, but rather focused to a large extent on a situation which was the subject of a previous NRC investigation and fine and which still had not been resolved. Furthermore, Wells' position was created as a direct result of a NRC proceeding. The Administrative Law Judge, as well as the Secretary, found Wells credible, and conversely found that the witnesses of KG&E were not credible but were shifting and unreliable in their testimony. Wells had, in fact, contacted the NRC and had made reasonably clear to his supervisors that he intended to see that his concerns were investigated. Consequently, the facts of the instant case and those of Brown & Root are clearly distinguishable. There is

present in the instant case that degree of formality that the Court in Brown & Root felt was lacking. As a consequence, a finding that Wells had engaged in protected activity is not inconsistent with the narrow holding of Brown & Root.

Brown & Poot was a narrow aberration based upon a particular factual situation. The great weight of authority including decisions in the Ninth, Second, and now the Tenth Circuits when fully considering the matter have found that internal filings are protected by the statute. In any event, however, in the instant action Wells was engaged in a proceeding within the meaning of the act, thus his activity would in all likelihood have been protected even by the Fifth Circuit. Based on the instant action, any conflicts which may exist are not substantial enough to justify the granting of the writ in the instant action.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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